

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA,
Complainant,

8 U.S.C. §1324a
PROCEEDING

vs.

ABC ROOFING AND WATERPROOFING, INC.
Respondent.

OCAHO CASE
No. 89100389

ORDER SETTING FILING SCHEDULE FOR
PROCEEDING UNDER THE EQUAL ACCESS TO JUSTICE ACT

An evidentiary hearing was conducted in this case on April 9, 10 and 11, 1991, in Brownsville Texas. On July 25, 1991, a Decision and Order dismissing the Complaint in its entirety was issued by the undersigned based on the evidence presented during the hearing and on the parties' post-hearing briefs. On August 26, 1991, the Chief Administrative Hearing Officer (CAHO) affirmed Decision and Order with respect to the dismissal of three of six counts in the Complaint.¹

On September 20, 1991, Respondent filed
Costs and Attorneys' Fees Under the Equal

¹ The CAHO vacated that portion of my Decision which addressed employees Ruiz, Alcala and Camarillo with instructions that the undersigned should conduct further proceedings on the issue of whether Complainant had complied with 28 C.F.R. §68.16 and 5 U.S.C. §552(a)(2)(C).

² On August 1, 1991, Respondent filed a premature application under an inapplicable rule. By motion dated September 23, 1991, Respondent seeks to withdraw that application. The motion is hereby granted.

Respondent premise its application on 28 U.S.C. §2412. 28 U.S.C. §2412 is applicable only in judicial proceedings; however, the Equal Access to Justice Act also enacted 5 U.S.C. §504 which is applicable in federal administrative proceedings. Since the provisions of 5 U.S.C. §504 (hereinafter "EAJA") substantially parallel the language of 28 U.S.C. §2412, I construe Respondent's instant request as originating under 5 U.S.C. §504.

EAJA mandates that a party seeking to recover costs and attorney fees under its provisions must satisfy a number of preliminary hurdles. The party must: 1) submit its fee application within thirty days of the final disposition in the adversary adjudication; 2) it must allege that it is a "prevailing party" eligible to receive an award under EAJA; 3) it must specify the amount sought; 4) it must include in its application a statement from an attorney, or other qualified individuals, stating the actual time expended as well as the rate at which the fees and expenses are computed; 5) the party must also allege in its fee application that the agency's position was not "substantially justified". 5 U.S.C. §504(a)(2).

The instant application for costs and attorneys' fees appears to satisfy EAJA's preliminary requirements. Initially, it is evident that the application was filed on September 20, 1991 within the 30-day limitation imposed by EAJA. The 30-day limitation for filing an application under EAJA begins to run after the entry of "final disposition". 5 U.S.C. §504(a)(2). The CAHO's August 1991 Decision and Order with respect to

three of the counts in the Complaint and appears to qualify as a final disposition regarding them. Second, Respondent's application alleges that, as a result of the issuance of the CAHO's order on August 26, 1991, Respondent is a "prevailing party" as to the issues concerning three of its employees; it further alleges that it is entitled to recover fees because it is a corporation with net worth of less than \$7,000,000 and had not more than 500 employees at the time the adversary adjudication was initiated. See 5 U.S.C. §504(b)(1)(B). Third, Respondent has stated in the application that it seeks \$875.70 in costs and \$26,087.50 in attorneys' fees calculated at \$75.00 per hour. Fourth, Respondent has included a detailed statement by its attorneys stating the actual time spent by them on the issues relating to the three dismissed counts.³ Finally, Respondent's application has alleged that the position taken by Immigration and Naturalization Service as to the three employees were not "substantially justified". From the foregoing, Respondent's application for costs and attorneys' fees appears to be facially valid.

The presiding Administrative Law Judge in an IRCA proceeding is empowered to grant attorneys' fees to a prevailing party other than the United States in accordance with EAJA's provisions. See Mester Mfg. Co. v. I.N.S., 900 F.2d 201, 203 (9th Cir. 1990); see also United States v. Mester Mfg. Co., OCAHO Case No. 87100001 (Order on an Application for Award of Attorney's Fees) (1/25/89);

³ Respondent's attorneys state they have refrained from seeking fees for the time they spent developing the selective prosecution and discriminatory enforcement defenses.

vacated by the CAHO, slip op. at 5 (5/23/89). Therefore the undersigned has jurisdiction over Respondent's instant Attorneys' Fees application.

Although the statute mandates that agencies shall by rule establish uniform procedures for the submission and consideration of EAJA cost and fee applications (5 U.S.C. §504(c)(1)), as yet the Department of Justice has not promulgated EAJA procedures specifically applicable in IRCA adjudications.

Accordingly, the following filing schedule for this EAJA proceeding will be adhered to by the parties unless modified by a subsequent order:

1. Complainant may file, no later than November 1, 1991, an answer to Respondent's Application for Costs and Attorneys' Fees. Failure to file a timely answer may be treated as a consent to the award requested. The answer shall explain all objections as well as identify the underlying facts which support Complainant's position.

2. Complainant may file a Motion to Dismiss the Application in lieu of an Answer by November 1, 1991. Such a Motion shall stay the time for filing an answer until 35 days after issuance of any order denying the motion.

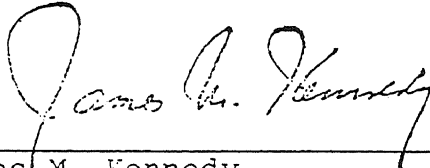
3. In the event that a Motion to Dismiss the Application is filed in this case, Respondent will file a Response to the Motion no later than 21 days after service of the dismissal motion.

4. If Complainant and Respondent believe the issues raised by the fee application can be settled, they may jointly file a

statement of their intent to negotiate toward a settlement. The filing of such a statement shall extend the time for filing an answer by the Complainant for an additional 35 days.

5. Respondent will file, no later than 21 days after service of Complainant's Answer, a Reply to the Answer.

SO ORDERED.



James M. Kennedy
Administrative Law Judge

October 2, 1991
San Francisco, California